

§5110 Enforcement Experience

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- How §5110 inspections are conducted
- What elements must be established
- Obstacles compliance officers have faced establishing these elements

§5110 Inspection Procedures

- Initiation: complaint, referral, accident, programmed
- Review OSHA Log 200s/300s to pinpoint suspect repetitive motion injuries (RMIs)
- Walkaround, photographs, equipment identification, document reviews
- Employee interviews
- Research, interview manufacturers, experts, etc.

Threshold Requirements for Enforcement

- §5110(a)
 - 1) More than one employee injured
 - 2) Injuries were predominantly (>50%) caused by repetitive work activity
 - 3) Employees were doing “identical” work
 - 4) Injuries were “objectively identified and diagnosed” by a physician as a RMI
 - 5) Injuries were reported to the employer within the last 12 months

The Investigation: Time and Effort

- To gather evidence of threshold requirements, CSHOs spend more time and effort beyond the standard inspection due to:
 - document reviews (accident reports; training; worker's comp)
 - employee interviews (on-site and off; in person and via telephone; may involve taking photographs, video, measurements)
 - medical record reviews (medical releases for inspections and appeals, interviews with physicians, Medical Unit involvement)

Challenges in Establishing §5110 Threshold Requirements

- “...identical work activity...”
 - N. CA hospital clinical lab; several employees performing a range of different tasks in a day
 - At least two injuries identified; however, unable to establish identical work activity due to highly varied work patterns and task distribution

Challenges in Establishing §5110 Threshold Requirements

- “...identical work activity...”
 - N. CA foundry with two injuries potentially linked to the use of air-powered hand tools
 - However, both employees used air tools to perform different tasks, and they used the tools for different time intervals
 - Therefore, identical work activity could not be established

Challenges in Establishing §5110 Threshold Requirements

- “...reported...within the last 12 months...”
 - N. CA rental car agency with more than two injuries identified as RMIs due to computer data entry
 - However, only **one injury** was reported within the 12 month period prior to the opening of the inspection; 3 other injuries were reported more than 12 months before the day the **one injury** was reported

Challenges in Establishing §5110 Threshold Requirements

- “...RMIs were...injuries that a licensed physician...identified and diagnosed...”
 - Employees do not seek medical attention
 - Injured employees are not treated by a licensed MD, but rather by a chiropractor, physical therapist, or nurse
 - The employees seek treatment, but do not report this to their employer, or do not file a worker’s comp claim

Challenges in Establishing §5110 Threshold Requirements

- The treating physician does not specifically describe the injury as a RMI
 - Form 5021 limited in diagnosis and predominant cause information
 - Therefore, the Medical Unit often must go “beyond” the form and ask the treating physician if the injury is a RMI and if the injury was predominantly caused by work

Challenges in Establishing §5110 Threshold Requirements

- N. CA airline carrier; baggage handlers lifting over 800 bags a day; hundreds of reported sprains and strains
- Employees were treated by physicians; however, the physicians did not write “RMI” or “RSI” on the Form 5021 (“Doctor’s First Report of Occupational Injury or Illness”)
- Therefore, employer contended that they were not informed by the physician or the employees that these injuries were RMIs

Challenges in Establishing §5110 Threshold Requirements

- N. CA foundry with one reported RMI
- Several other employees reported similar symptoms to the CSHO, but they did not seek medical treatment
- Employees were monolingual Spanish-speakers who did not know about the worker's comp system, or did not want to participate in worker's comp for fear of drawing attention to themselves (e.g. undocumented workers)

§5110(c): Satisfaction of an Employer's Obligation

- Measures implemented by an employer under subsections (b)(1), (b)(2), and (b)(3) shall satisfy the employer's obligation under that respective subsection, unless it is shown that a measure **known to** but not taken by the employer is **substantially certain** to cause a **greater reduction** in such injuries and that this alternative measure would not impose **additional unreasonable costs**.

DOSH's Responsibilities under §5110(c)

- The burden of proof lies on DOSH's shoulders in showing that:
 - There is a different method that the employer knows about that would reduce injuries even further or would be more effective
 - If DOSH can show that other methods would be more effective, DOSH then must show that implementation of these methods would be economically feasible for the employer

DOSH's Responsibilities under §5110(c)

- N. CA airport dispatch center employees were given a pamphlet on ergonomics
- Although the stated policy was to have a physical therapist individually train each employee, this did not occur
- The employer contended that providing the pamphlet satisfied the training requirement, and that DOSH could not prove with “substantial certainty” that a one-on-one session with the physical therapist would result in a “greater reduction” of injuries without imposing “additional unreasonable costs”

Summing It All Up...

- §5110 has been a challenge to enforce because:
 - Establishing the threshold requirements in §5110(a) is difficult; and
 - Even when CSHOs have established that all the elements of §5110(a) have been met, they then have to prove the elements of §5110(c)